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No.

IN THE

Supreme Court of the United States

October Term, 1983

BIO/BASICS INTERNATIONAL CORPORATION,
Petitioner,

v.

ORTHO PHARMACEUTICAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether New York law immunizes an unsubpoenaed witness who appears before a congressional legislative subcommittee from a subsequent lawsuit based upon his testimony before the subcommittee?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ: The Court of Appeals Has Decided an Important State Question Concerning the Scope of Absolute Immunity in a Way in Conflict with Applicable State Law and Public Policy	5
Conclusion	10
Appendix—Order of the Second Circuit Court of Appeals	1a

TABLE OF CITATIONS

Page

Cases Cited:

Andrews v. Gardiner, 224 N.Y. 440 (1918) 5,6,2a

Miscellaneous:

Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875 (1956) 8,9

Note, Protection from Defamation in Congressional Hearings, 16 U. Chi. L. Rev. 544 (1949) 9

Veeder, Absolute Immunity in Defamation: Judicial Proceedings 9 Colum. L. Rev. 463 (1909) 7,8

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was unpublished and appears in the appendix hereto. The opinion of the District Court is reported at 545 F.Supp. 1106 (S.D.N.Y. 1982).

JURISDICTION

The petitioner Bio/Basics International Corporation respectfully prays that a writ of certiorari issue to review a Judgment and unpublished opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 17, 1983, and this petition for certiorari was filed within 90 days of

that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Ortho is a subsidiary of Johnson and Johnson, Inc., and is primarily engaged in the manufactured, distribution, and sale of pharmaceutical and medical products. Bio/Basics devotes its activities in large part to matters undertaken on behalf of companies, such as Ortho, that manufacture pharmaceutical products.[1] Among other things, Bio/Basics offers its clients assistance in the testing of new therapeutic substances. The services that Bio/Basics customarily makes available to a client for this purpose include: (1) locating "clinical investigators" who are qualified and willing to engage in testing new therapeutic substances; (2) furnishing administrative services necessary for such testing to be conducted; (3) forwarding the results of such testing to the client, that is, to the manufacturer of the substance being tested; and (4) communicating and consulting with the client on various matters relating to such testing.

Beginning in September, 1975, Ortho and Bio/Basics entered into a series of contracts whereby Bio/Basics agreed to retain the clinical investigators necessary to conduct studies relating to the safety and efficacy in humans of a drug known as "suprofen." Suprofen is a non-narcotic analgesic agent designed to relieve mild to moderate pain. In these contrasts, Bio/Basics further agreed to retain a group of recognized academic experts to conduct a "peer group review" of the studies of suprofen that were to be performed by clinical investigators. The

"clinical investigation" and "peer group review" that Bio/Basics agreed to conduct on Ortho's behalf were undertaken for the purpose of supporting a "New Drug Application" ("NDA") that Ortho intended to file with the approval of suprofen for marketing to the general public in the United States. Bio/Basics alleges that it fully and properly performed all of its obligations under these contracts.

On October 11, 1979, George A. Braun, Ortho's Vice-President for Scientific Affairs, appeared before the Sub-committee on Health and Scientific Research of the Committee on Labor and Human Resources of the United States Senate ("the Senate Subcommittee"), which was at that time conducting hearings on fraud and abuse in the testing of new drugs on human subjects. While Braun had not been subpoenaed to testify, his appearance was pursuant to the Senate Subcomittee's specific request that someone from Ortho provide information about the clinical studies conducted on suprofen for Ortho by Bio/Basics. Braun's testimony consisted of a prepared statement, which he read into the record with the permission of Senator Edward M. Kennedy, Chairman of the Senate Subcommittee, and also of answers to certain questions posed by Senator Kennedy. In his prepared statement, Braun first described the aforementioned contractual relationship between Ortho and Bio/Basics. He then told the Senate Subcommittee that the clinical studies of Suprofen contemplated by the Ortho-Bio/Basics contracts had been completed by late 1977 and that Ortho had filed its NDA for Suprofen in October 1978. According to Braun, the FDA, in the course of processing Ortho's NDA for Suprofen, reviewed the data submitted by certain of the clinical investigators retained by

Bio/Basics and advised Ortho that the data might be "worthless." Ortho responded to its receipt of this information, said Braun, by commencing a complete review of all the documents relating to the Bio/Basics study of Suprofen. Braun's statement then asserted that Ortho's review of Bio/Basics' Suprofen study showed that the "peer group review" contemplated by the contracts with Bio/Basics "had not been utilized as originally anticipated," and that "data from many of the [Bio/Basics] studies [were] not usable or [were] usable only to a limited extent."

Bio/Basics responded to Braun's testimony before the Senate Subcommittee by commencing this lawsuit. According to the complaint, Braun's statement to the Senate Subcommittee contained false and misleading information and was made by Braun with the knowledge that it contained such information and with the intent of injuring Bio/Basics. Several existing and potential clients of Bio/Basics, located in various states of the United States, including New York, learned of Braun's statement to the Senate Subcommittee. As a direct result of Braun's statement, two clients of Bio/Basics, including one client located in New York, terminated their contracts with Bio/Basics, and two potential clients of Bio/Basics, one of which was located in New York, terminated their precontractual relations with Bio/Basics. The complaint alleges that Braun knew of these contractual and precontractual relationships when he made his statement to the Senate Subcommittee and that his statement was intended to interfere with those relationships. Accordingly, the complaint alleges that, by virtue of Braun's statement, Ortho tortiously interfered with contractual relations between Bio/Basics and its clients, tortiously interfered with

precontractual relationships between Bio/Basics and its potential clients, committed a breach of the fiduciary relationship between Bio Basics and Ortho, and defamed Bio/Basics.

The judgment rendered by the District Court was affirmed by the Court of Appeals. The Court of Appeals held, in short:

> "Appellant cites *Andrews v. Gardiner,* 224 N.Y. 440 (1918), in support of its claim that voluntary testimony is entitled only to a qualified privilege. But *Andrews* involved statements made in an application for a pardon. At most, that case may suggest that someone who appears unasked before a legislative committee and is allowed to testify might be entitled only to a qualified privilege. In this case, however, Braun appeared at the request of the Senate subcommittee. We believe that the distinction between a Senate request to testify and a subpoena to testify is insignificant in this context, since the committee that makes the request has the power to enforce it with a subpoena. Accordingly, we reject appellant's argument that to confer immunity on Braun would unnecessarily extend the scope of absolute privilege under New York law."

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important state question concerning the scope of absolute immunity in a way in conflict with appicable state law and public policy.

It is undisputed that "on October 11, 1979, George A. Braun, Ortho's Vice-President for Scientific Affairs, appeared before the Subcommittee on

Health and Scientific Research of the Committee on Labor and Human Resources of the United States Senate ("the Senate Subcommittee"), which was at that time conducting hearings on fraud and abuse in the testing of new drugs on human subjects. While Braun had not been subpoenaed to testify, his appearance was pursuant to the Senate Subcommittee's specific request that someone from Ortho provide information about the clinical studies conducted on Suprofen for Ortho by Bio/Basics. Braun's testimony consisted of a prepared statement, which he read into the record with the permission of Senator Edward M. Kennedy, Chairman of the Senate Subcommittee, and also of answers to certain questions posed by Senator Kennedy."

Thus, it is clear that Ortho presented its statement not as a public officer, but rather as one performing the narrow 'governmental function' of voluntarily providing information on a subject being considered by a legislative subcommittee. It is significant that the remarks at issue here were not extemporaneous responses to legislative inquiries but rather were contained in a statement prepared well in advance of the subcommittee hearing. Moreover, defendant's limited function of providing unsubpoaned testimony did not fall within the scope of absolute privilege.

It is also apparent, that as a matter of New York Law, a distinction would also be made between a voluntary and non-voluntary witness' testimony before a legislative committee; an individual who makes voluntary statements before a legislative committee would be accorded a qualified privilege. *Andrews v. Gardiner,* 224 N.Y. 440 &1918). In *Andrews v. Gardiner, supra,* a libel action was brought against

an attorney who prepared a pardon petition addressed to the Governor; the petition allegedly recited defamatory charges against another attorney who had much to do with the prosecution of the individual seeking the pardon. The New York State Court of Appeals held that a qualified privilege, not an absolute one extended to a person preparing an application for a pardon. In so holding, Judge Cardoza stated at page 448:

> "There is no license, under cover of such an occasion, to publish charges known to be false or put forward for revenge. *We are not dealing here with statements made by witnesses required to attend a hearing (Prison Law, secs. 261, 262, 265): there is a distinction between the testimony of witnesses and voluntary complaints (Wright v. Lothrop, supra).* We do not go beyond the case before us. Our ruling is in harmony with the tendency of courts to restrict the scope of absolute privilege in libel *(Blakeslee v. Carroll, supra,* at p. 235; Odgers on Libel and Slander, pp. 230, 231). It is in harmony with rulings made where petitions have been submitted to the governor or the legislature for relief against oppression or the redress of other wrongs (*Wright v. Lothrop, supra,* at p. 390; *Proctor v. Webster, supra; Woods v. Wiman,* 122 N.Y. 445; *Cook v. Hill,* 3 Sandf. Supr. Ct. 341; *Maurice v. Worden,* 54 Md. 233); the oppression of a harsh or unjust judgment is not to be distinguished in this respect from any other abuse of power. The ruling gives just protection alike to suitor and to counsel and charges them with liability only when the privilege is abused." (*emphasis added*).

In addition, the primary basis of absolute privilege is "to insure freedom of speech where it is essential that freedom of speech exist." *Veeder, Ab-*

solute Immunity In Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 469 (1909). It has also been stated "that efficient democratic government requires a free disclosure of facts by public officials in official proceedings." *Note, Developments in the Law—Defamation,* 69 Harv. L. Review, 875, 917 (1956). While these policy considerations are perhaps ideally suited for formal judicial proceedings, they have come under attack when applied to witnesses who testify before legislative committees.

> "But the position of the witness before a committee is most vulnerable. The authority for the proposition that such a witness is absolutely protected from libel and slander suits is surprisingly scant. The Courts have not considered this privilege as an extension of that accorded the legislator but have based it on the analogy of the immunity granted statements by a witness in a judicial proceeding. Retrospectively, this development seems improper. Not only is remedial legislation desirable, but a persuasive argument can be directed against the rule in those courts where it has yet to be conclusively established.
>
> "The differences in the positions of judicial and legislative witnesses justify different rules of privilege. Enforcement of the rules of evidence, effective guarantees of thorough cross-examination, and the probability of a more impartial hearing in a judicial proceeding underline these differences. In addition there is a greater likelihood that all controverting evidence will be presented. Criminal prosecutions often must be initiated by a grand jury indictment and, unlike many committee investigations, legal proceedings are resolved by a final verdict which ordinarily will be given much more publicity and credence than charges made in the course of the trial. Moreover, the widespread publicity afforded legislative in-

vestigations gives the congressional witness a far greater power to harm than his legal counterpart. The limited procedural reforms proposed would by no means obliterate these differences. Privileges in the law of defamation are based on the belief that the benefits to the public of free speech will outweigh the harm which may result to individuals. But congressional investigations have upset this balance. Because of the greater probability of harm it is submitted that public policy will best be served if a greater measure of protection is accorded to the individual by conferring only a qualified privilege on congressional witnesses."

Note, Protection From Defamation in Congressional Hearings; 16 U. Chi. L. Rev. 544, 552-53 (1949); *See also, Note, Developments in the Law Defamation, supra* at p. 922.

Although Ortho's testimony was sought by the Senate Subcommittee, Ortho was not a disinterested citizen anxious to help the committee obtain information to aid the committee in its work. Ortho was an interested party. Its only concern was to disclaim any responsibility on its part for the testing procedures, and its interest was in making a public statement that it was plaintiff's testing work that was inadequate. In addition, Ortho was not only in the position of a witness who was attempting to fully answer, extemporaneously, the question being put by a legislator seeking information; Ortho's testimony consisted primarily of a statement prepared in advance of the Committee hearing—the matter complained of by plaintiff was contained in the prepared statement. Therefore, as a matter of New York law and public policy, the privilege accorded to Ortho's voluntary testimony before a subcommittee of the United States Senate should be qualified.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

ORDER OF THE SECOND CIRCUIT COURT OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of January, one thousand nine hundred and eighty-three.

Present:

HON. WILFRED FEINBERG, Chief Judge
HON. RICHARD J. CARDAMONE, Circuit Judge
HON. OSCAR H. DAVIS,* Circuit Judge.

BIO/BASICS INTERNATIONAL CORPORATION,

Plaintiff-Appellant,

v.

ORTHO PHARMACEUTICAL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

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* United States Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

1. Since both parties agree that New York law is controlling in this case, we decide the case on that basis. Bio/Basics argues that George A. Braun, Ortho's then vice-president for Scientific Affairs, had only a qualified privilege when he testified before a Senate subcommittee investigating fraud in drug testing, because he was testifying voluntarily rather than under a subpoena. We think Judge Ward was correct, however, when he found that although there is no New York case directly on point, it appear that a New York court would treat a witness's pertinent testimony before a legislative committee as absolutely privileged. See, e.g., Julien J. Studley, Inc. v. Lefrak, 50 AD.2d 162, 164-65 (2d Dep't 1975), aff'd, 41 N.Y.2d 881 (1977); Loudin v. Mohawk Airlines, Inc., 44 Misc. 2d 926, 927-28 (Sup. Ct. N.Y. Co. 1964), modified on other grounds, 24 A.D.2d 447 (1965). "Appellant cites *Andrews v. Gardiner,* 224 N.Y. 440 (1918), in support of its claim that voluntary testimony is entitled only to a qualified privilege. But *Andrews* involved statements made in an application for a pardon. At most, that case may suggest that someone who appears unasked before a legislative committee and is allowed to testify might be entitled only to a qualified privilege. In this case, however, Braun

appeared at the request of the Senate subcommittee. We believe that the distinction between a Senate request to testify and a subpoena to testify is insignificant in this context, sicne the committee that makes the request has the power to enforce it with a subpoena. Accordingly, we reject appellant's argument that to confer immunity on Braun would unnecessarily extend the scope of absolute privilege under New York law."

2. We have considered all of the appellant's arguments. None of them persuades us to reverse Judge Ward.

s/Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

s/Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judge

s/Oscar H. Davis
OSCAR H. DAVIS, Circuit Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.